

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 99-496

August 13, 2001

Telergy Network Services, Inc.
Petition for Finding of Public
Convenience and Necessity to
Provide Service as a Local Exchange and
Interexchange Telephone Utility

ORDER GRANTING AUTHORITY
TO PROVIDE LOCAL EXCHANGE
SERVICE AS A RESELLER AND
FACILITIES-BASED AND RESOLD
INTEREXCHANGE SERVICE AND
APPROVING SCHEDULES OF RATES
AND TERMS AND CONDITIONS

WELCH, Chairman; NUGENT and DIAMOND, Commissioners

In this Order, the Commission grants Telergy Network Services, Inc. (Telergy) the authority to provide competitive local exchange service as a reseller and facilities-based and resold intrastate interexchange service in the State of Maine, and approves the Company's Terms and Conditions and Rate Schedules. We also exempt Telergy from the requirements of Chapter 210, *Uniform System of Accounts*, and of 35-A M.R.S.A. §§ 707 and 708, subject to the conditions described below.

I. APPROVAL OF APPLICATION TO SERVE

On July 21, 1999, pursuant to 35-A M.R.S.A. §§ 2102 and 2105, Telergy filed a petition with the Commission requesting authority to provide local exchange and interexchange telephone service in Maine. Before we grant approval under section 2102 for another public utility to provide service, 35-A M.R.S.A. § 2105 requires us to find that the public convenience and necessity require another utility to provide service in a location where utility is already authorized to provide, or is providing, the same or similar service.

47 U.S.C. § 253(a), enacted by the Telecommunications Act of 1996, states:

(a) In General. No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunication service.

47 U.S.C. § 253(b) states, however:

(b) State Regulatory Authority. Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

We find that granting Telergy the authority to provide local exchange and interexchange services in Maine will not impede the preservation or advancement of the public interest goals or policies stated in section 253(b).

Telergy's application provides reasonable information indicating that its financial and management capabilities are adequate to provide local and interexchange services in Maine.

II. SERVICE TERRITORY

A. Interexchange Service Authority

Telergy has requested authority to provide facilities-based and resold interexchange service throughout the state. We grant that authority.

B. Local Service Authority

Telergy initially requested authority to provide facilities-based and resold local exchange service throughout the state. It recently has agreed that at present the Commission will limit its authority to the provision of local exchange service as a reseller. Telergy will have authority to provide local exchange service as a reseller throughout the state. Telergy states that it will offer service as a reseller of local exchange service provided by other authorized local exchange carriers (LECs). We define local resale as the offering of local exchange service purchased from another competitive local exchange carrier (CLEC) pursuant to 47 U.S.C. § 251(b)(1) or from an incumbent local exchange carrier (ILEC) at a wholesale discount pursuant to 47 U.S.C. § 251(c)(4). The purchase of unbundled network elements from an ILEC and their use in providing local exchange service is facilities-based service and is not resale. Telergy's authority to provide local exchange service is limited to resale unless it obtains further authorization from the Commission.

If Telergy wishes to expand the scope of its authority in the future to provide facilities-based switched local exchange services, it shall seek approval pursuant to 35-A M.R.S.A. § 2102, requesting the Commission to amend this Order. Any such request must specify the specific exchanges where it proposes to offer service and include information establishing a readiness to provide facilities-based local exchange service within six months in the specifically identified areas. The Commission will act expeditiously on any such application and revisions of Telergy's Terms and Conditions.

III. APPROVAL OF TERMS AND CONDITIONS AND RATE SCHEDULES

Telergy has proposed separate rate schedules and terms and conditions for local and interexchange service. We allow the rates and terms and conditions proposed by Telergy, as described in Ordering Paragraphs 4 and 5 to go into effect. Telergy used the Commission's standard terms and conditions that comply with Maine law and the

Commission's Rules. We have reviewed the Company's petition, Terms and Conditions, and Rate Schedules, and they appear to comply with Maine law and the Commission's Rules. Nevertheless, if there is any conflict between a provision in Telergy's terms and conditions and the Commission's Rules or a statute, the rule or statute will control. Included in the Terms and Conditions is a provision stating that in the event of such a conflict, the statute or the Commission's Rule will control.

In general, the Commission believes that a competitive telecommunications market results in services and rates that benefit the public. We believe that the acceptability of Telergy's services and rates in the market place provides an adequate test of the reasonableness of the Company's rates. Accordingly, we allow the rates proposed by Telergy to go into effect.

IV. INTERCONNECTION AGREEMENT(S)

In order to provide local exchange service, a CLEC must, as a practical matter, obtain an interconnection agreement with the ILEC(s) providing service in any area where it intends to provide service. In the absence of such an agreement, it will not be possible for Telergy's customers to call customers of the ILEC(s), and vice versa. Interconnection agreements are governed by 47 U.S.C. § 252, and must be approved by this Commission.

If a CLEC makes a bona fide request for an interconnection agreement with an ILEC that is a "rural telephone company" as defined in 47 U.S.C. § 153 (37), the "rural exemption" of 47 U.S.C. § 251 (f) will apply. All of Maine's independent incumbent local exchange carriers are "rural telephone companies." A rural telephone company is not required to negotiate an interconnection agreement or provide interconnection until after the Commission, pursuant to 47 U.S.C. § 251(f)(1)(B), finds that the requirement "is not unduly economically burdensome, is technically feasible, and is consistent with [the universal service provisions of] section 254" Although the service territory we grant today is statewide and Telergy's terms and conditions do not limit its service territory, as a practical matter Telergy cannot offer local exchange service in the service territory of a rural ILEC until such time as that ILEC's rural exemption is terminated.

On November 8, 2000, in Docket No. 2000-861, the Commission approved an agreement between Telergy and Verizon Maine pursuant to 47 U.S.C. § 252. As a condition of providing local exchange service, Telergy must comply with the terms of any interconnection agreements that it has reached with any ILECs and that have been approved by the Commission.

V. PAYMENT OF ACCESS CHARGES

Our approval of Telergy's application to provide interexchange service in Maine is conditioned on the payment of access charges to local exchange carriers (LECs) who have on file with the Commission approved access charge rate schedules.

The Commission has granted authority to Telergy to provide interexchange service both as a facilities-based carrier and as a switchless reseller.¹ To the extent that Telergy provides facilities-based interexchange service, it must pay access charges directly to local exchange carriers. Whenever Telergy begins to provide facilities-based interexchange service, it shall notify the Commission and all LECs from which it obtains access, as required by the ordering paragraphs.

Telergy states that at it will be offering at least some of its service as a switchless reseller in addition to facilities-based interexchange service. Switchless resellers do not pay access charges to local exchange carriers. Instead, access charges are paid by an underlying facilities-based interexchange carrier. As a condition of granting authority to a switchless reseller to provide intrastate service in Maine, Telergy's underlying facilities-based carrier must also have authority to provide intrastate service in Maine. Telergy has stated that WorldCom will be the underlying carrier from which it purchases interexchange services that it resells. WorldCom is authorized by the Commission to provide intrastate facilities-based interexchange service and must pay access charges for the intrastate interexchange services it sells to switchless resellers providing interexchange service in Maine. If Telergy begins to use another underlying carrier, that carrier must be authorized to provide intrastate facilities-based interexchange service, and Telergy shall notify the Commission and all local exchange carriers from which it obtains access services, as required by the ordering paragraphs.

VI. WAIVERS; REPORTING REQUIREMENTS

As a condition of providing local exchange service, Telergy must comply with the terms of any applicable Commission orders or rules that may govern local interconnection and compensation for interconnection. Telergy shall also comply with any applicable Commission Rules or orders that govern universal service, public safety and welfare, service quality and consumer rights.

Pursuant to sections 11(A) and 12(A) of Chapter 280, which govern carriers' interexchange activities, Telergy is exempt from Chapter 210 of the Commission's Rules, which governs telephone utility accounting and annual financial reports, and from 35-A M.R.S.A. §§ 707 and 708, which govern approvals for reorganizations and contracts with affiliated interests. Telergy has requested a waiver from the requirements of Chapter 210 for its local exchange service, and, although it did not request waivers from 35-A M.R.S.A. §§ 707 and 708 for its local exchange service, we grant all of those waivers. Because Telergy's rates and operations are likely to be

¹We define switchless resellers as entities which do not own, lease, or control any switching facilities, or private lines, that it will use to provide telecommunication services in Maine. A reseller who owns a switch in another state, and plans to use that switch to switch or carry Maine traffic, is a facilities-based interexchange carrier. A reseller who does not own facilities in Maine or any other state, or who owns facilities in another state but does not plan to use that switch to carry Maine traffic, is a switchless reseller.

subject to market forces, we do not see any present need to subject the Company to those requirements.

However, the Company must report its annual intrastate gross operating revenues, its revenues derived from sales to other carriers, its annual intrastate minutes for use for the purpose of determining its regulatory assessment, and such other information requested by the Commission.² If Telergy resells service to other switched or switchless telephone service providers, the Company must maintain its records so that it may separately identify those sales. Pursuant to Chapter 280, § 11(B), Telergy

shall maintain records sufficient to identify and to allow auditing of traffic volumes, intrastate interexchange billings for both retail and wholesale services, and all information that is necessary to calculate access or interconnection charges in accordance with this Chapter. Those records shall be maintained for a minimum of 2 calendar years.

The exemptions from the affiliated interest approval requirements of 35-A M.R.S.A. §§ 707 and 708 granted by Chapter 280, § 12(A) are subject to the notice requirements contained in Chapter 280, §§ 12(B) and (C) and in the ordering paragraphs below.

In addition, Telergy shall inform the Commission of any changes to its corporate structure and ownership and of any changes in the name under which it does business, as set forth in the ordering paragraphs below. If necessary, it shall also refile its rate schedules and terms and conditions to reflect its new identity.

VII. OTHER REQUIREMENTS

Telergy shall comply with all applicable rules of the Commission and statutes of the State of Maine, including the customer notification rule described in the ordering paragraphs below.

VIII. ORDERING PARAGRAPHS

Accordingly, we

1. Grant, pursuant to 35-A M.R.S.A. §§ 2102 and 2105, the request of Telergy to provide competitive local exchange telephone service as a reseller and facilities-based and resold interexchange service in the State of Maine;

²The Commission mails the annual reporting forms to carriers in January of each year. The completed forms are due by April 1 of each year.

2. Exempt Telergy from the requirements of Chapter 210 of the Commission's Rules, except that it must report the revenue and minutes of use information that is requested by the Commission, on or before April 1 of each year;

3. Exempt Telergy from approval requirements of 35-A M.R.S.A. §§ 707 and 708, but Telergy shall provide notice to the Commission of any reorganization, as defined in 35-A M.R.S.A. § 707 (1)(A), that results in a merger, sale or transfer of a controlling interest of Telergy or of any entity that owns more than 50% of Telergy. The notice required by this subsection shall be filed within 10 days following any reorganization described herein, as required by Chapter 280, § 12(B). As required by Chapter 280, § 12(C), Telergy shall also provide notice of any other changes in the name under which it does business (d/b/a), any change of the location of its business office, and any change of its contact person. Telergy shall provide the Administrative Director of the Commission with notice of any of the changes described within 30 days following the change. If necessary, Telergy shall amend its rate schedules and terms and conditions to reflect any change in identity; and

4. Order that Telergy's proposed terms and conditions and rate schedules for local exchange service shall be effective on the date of this Order. Those pages consist of Title Page Original through Section 12, Original Page No. 4, filed on December 14, 2000, *except for* pages 9, 10, 14, 15, 18, and 19 in Section 2, which instead shall become effective in the versions labeled "Original" that were filed on June 19, 2001.³

5. Order that Telergy's proposed terms and conditions and rate schedules for interexchange service, filed on October 12, 2001 and consisting of Original Pages 1-68, shall be effective on the date of this Order.⁴

6. Order that Telergy, or an underlying facilities-based interexchange carrier authorized to provide interexchange service in Maine, shall pay interexchange access charges as required approved access rate schedules filed by local exchange carriers. Telergy shall notify the Commission and all local exchange carriers from which it obtains access services of any change in its underlying carrier within 30 days following the change. Any underlying carrier used by Telergy must have the authority to provide intrastate interexchange service in Maine. Telergy shall immediately inform the Commission and all local exchange carriers in the State of Maine from which Telergy will be purchasing access services if there is any change in its operations that will result in its carrying, switching, or any processing of any of its own traffic, at which time Telergy shall begin to pay access charges directly to those local exchange carriers that have approved access charge schedules on file with the Commission; and

³The pages filed on June 19, 2001 that are labeled "original FIRST DRAFT" are not approved by this Order.

⁴The interexchange rate schedules and term and conditions filed with the Petition on July 21, 1999 will not become effective.

7. Order that Telergy shall comply with all applicable rules of the Commission, including the requirement of Chapter 280 § 10 that interexchange carriers provide notice to all affected customers of an increase to any rate that is greater than 20%.

PETER: MAKE SURE MARY KNOWS WHAT TARIFFS TO APPROVE.

Dated at Augusta, Maine, this 13th day of August, 2001.

BY ORDER OF THE COMMISSION

Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
 Nugent
 Diamond

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.
2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within 30 days of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320 (1)-(4) and the Maine Rules of Civil Procedure, Rule 73 et seq.
3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320 (5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.